

United States District Court

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES BOSCH)	Case No.: C 04 3837 (SBA)
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Plaintiff,)	ORDER ON CROSS MOTIONS
)	
v.)	
)	
FIRST FINANCIAL INSURANCE)	
COMPANY, and DOES 1 through 100,)	
)	
Defendant(s).)	
)	
)	

This matter arises from an underlying incident in which the plaintiff was injured as a result of the use and operation of a pickup truck owned by Menesh Mehta, which was being driven by Jorge Velasquez at the time. The pickup truck was used as part of Mehta’s parking lot business operations. Plaintiff previously brought an action in state court to recover from parties claimed responsible for the accident and injuries. The pickup truck was insured specifically by California State Automobile Association (CSAA) under an automobile insurance policy. In that underlying case, plaintiff was paid \$100,000 under that policy by CSAA for his injuries caused by the pickup truck.

Plaintiff then brought this separate action in which he claims that there was additional insurance coverage for his injuries under a commercial general liability insurance policy issued to Mehta’s business by defendant First Financial Insurance Company (FFIC). Defendant

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2 contends that there is no coverage under the defendant's insurance for those injuries based on an
3 "auto exclusion" contained in Mehta's business' insurance policy with defendant (FFIC CGL
4 policy). The parties have filed cross motions on the insurance coverage issue.

5 The language of the "auto exclusion" in defendant's general liability insurance policy
6 specifically states that "this insurance does not apply to" injury/damages arising out of the
7 ownership, maintenance, use, operation or entrustment to others of an "auto" that was "owned or
8 operated by or rented or loaned to any insured." The parties agree, and the court finds, that the
9 undisputed facts here show that the injury for which plaintiff seeks insurance coverage "arose
10 out of" the "use" and/or "operation" of an auto (and that the pickup truck meets the policy's
11 definition of an "auto") as those terms are used in the exclusion. Therefore, the first part of the
12 exclusion is present under these facts. As to the second part of the exclusion, the court finds
13 that, under the undisputed facts, the pickup truck was "loaned to" an insured within the meaning
14 of those terms as used in that part of the exclusion. For those reasons, the auto exclusion applies
15 here to bar coverage for plaintiff's injuries as a matter of law.

16 Therefore, as discussed more below, the court finds that defendant's motion for summary
17 judgment should be granted and plaintiff's cross motion for partial summary judgment should be
18 denied.

19 DISCUSSION

20 1. Legal Standard

21 Summary judgment is proper when the pleadings, discovery, and affidavits show that
22 there is "no genuine issue as to any material fact and that the moving party is entitled to
23 judgment as a matter of law." Fed. R. Civ. P. 56(c). See also *Southwall Techs., Inc. v. Cardinal*
24 *IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir.), cert. denied, 516 U.S. 987 (1995). Material facts are
25 those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
26 248 (1986). Defendant here has the burden of demonstrating the absence of a genuine issue of
27 material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Plaintiff must set forth
28 specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

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2.The Underlying Facts

The record submitted by the parties reflects the following facts which the court finds are not in dispute.

a.The Vehicle Incident

On April 23, 2003, San Francisco police officer James Bosch was on foot when he saw and heard the driver of a blue Toyota pickup truck (“Pickup Truck”) acting unusually. The Pickup Truck was stopped on the roadside on a surface street in San Francisco. Bosch approached to question the driver, Jorge Velasquez; Velasquez then tried to flee by abruptly pulling away in the Pickup Truck. Bosch became entangled in the Pickup Truck and was dragged along for several hundred feet as the Pickup Truck sped off. Bosch sustained injuries in the incident. Velasquez was arrested and charged criminally for causing the incident. The Pickup Truck was owned by Menesh Mehta and his wife. At the time of the incident, the Pickup Truck was insured by the Mehtas under a personal auto insurance policy they obtained from California State Automobile Association.

b.The Underlying Lawsuit

For his injuries, Bosch brought a negligence lawsuit against Velasquez and the owner of the Pickup Truck, Menesh Mehta, in San Francisco Superior Court (“underlying action”). Later, after learning that Mehta’s parking lot business had liability insurance through the FFIC CGL policy, Bosch amended the complaint to add Mehta’s parking lot businesses as defendants, under a theory that the business negligently hired/retained/entrusted Velasquez. CSAA provided a full and complete defense for Mehta and his business in the underlying lawsuit by assigning their defense to its panel counsel, Dan Winters and the law firm Winters, Kurg & Delbon. Winters defended Mehta on behalf of CSAA. FFIC declined to defend or indemnify Mehta or his business in connection with the allegations in the lawsuit because it determined that the CGL policy issued by FFIC did not provide any insurance coverage for the Pickup Truck incident.

An interim settlement agreement was reached in the underlying lawsuit. Even though it was not a party to the action, CSAA signed the agreement along with all the parties in the lawsuit. The agreement provided that CSAA would pay to Bosch its full policy limits

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2 (\$100,000) available under the auto insurance policy insuring Mehta's Pickup Truck. CSAA
3 also agreed that it would continue to provide a full defense to Bosch's claims against Mehta and
4 his parking lot businesses. The agreement also purported to assign to Bosch all of Mehta's rights
5 as against FFIC under the CGL policy, with a covenant by Bosch not to execute upon any
6 judgment obtained against the defendants in the underlying action.
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8 After that interim agreement was purportedly reached in the underlying lawsuit, the
9 parties then agreed to litigate the matter by way of binding arbitration rather than a trial in
10 Superior Court. Purportedly, an arbitration hearing was held thereafter and an arbitration award
11 was issued. The award was not confirmed by the court, nor was any actual judgment entered by
12 the Superior Court. Instead, counsel filed a document with the clerk of court which was entitled
13 "Judgment" and which was neither signed by the court nor confirmed or otherwise approved by
14 the court.

15 The arbitrator's decision included the following finding: "On April 23, 2003, the date of
16 the subject incident, defendant Jorge Velasquez, while in the course and scope of his
17 employment with defendant, Minesh K. Mehta, dba Place 2 Park Corporation, negligently
18 caused injuries and damages to plaintiff, James Bosch."

19 **c.Mehta's Parking Lot Business**

20 Mr. Minesh Mehta was the owner and operator of several parking lot businesses known
21 under several names: "Place 2 Park, LLC," "Safe Park Corporation" and "Car Park Management
22 Corporation." The businesses were operated as corporate entities, and Mehta was the sole owner
23 of each of them (the businesses are collectively referred to for purposes of this motion as "Place
24 2 Park."). At relevant times, Mehta ran Place 2 Park operations using a number of different
25 parking lots in San Francisco, Oakland and San Jose. Most of the lots were open air, with pay
26 stations where parking customers deposited money. Some of the lots had attendants who worked
27 for the business and some did not. Mehta hired Jorge Hernandez to work for his parking lot
28 business. Payroll records indicate that Hernandez was a salaried employee of the business
known as "Place 2 Park, LLC" at relevant times. Mehta testified at deposition that Hernandez
was considered a "Supervisor."

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3 Hernandes performed a number of duties for Mehta's business. He was responsible for
4 visiting each of the lots in San Francisco and Oakland every weekday to oversee their operations.
5 It was his job to travel to each lot to make sure things were running smoothly and as intended by
6 Mr. Mehta. To ensure operations ran properly, he handled a variety of tasks. For example,
7 Hernandez would make sure that the appropriate workers were present at the particular lots that
8 were designed to be staffed with attendants. He also would perform maintenance, such as
9 cleaning lots and hauling away garbage from them. In addition, he would replace and repair pay
10 machines at the lots as needed - during a several-month period of time, he was responsible for
11 removing outdated manual pay stations at some lots to replace them with new automated pay
12 stations. The manual pay stations were replaced at the business' San Francisco lots in response
13 to a city rule passed to require the stations to be automated so as to provide written pay receipts
14 to customers, a feature not available from the manual stations.

15 Mehta gave Supervisor Hernandez permission to incur expenses and to hire workers to
16 help him perform the various maintenance duties required at the lots and the jobs of switching
17 out old pay stations with new ones. In turn, Mehta's business would reimburse Hernandez for
18 expenses incurred by Hernandez for the work he did at the lots, such as for the costs of tools or
19 supplies needed by Hernandez to do his work at the lots. Mehta's business also would reimburse
20 Hernandez for payments made by Hernandez to workers that he lined up to help him in the
21 maintenance work.

22 **d. The Blue Toyota Pickup Truck**

23 Mehta and his wife owned the subject 1990 blue Toyota pickup Pickup Truck, which
24 they bought new. For years Mehta used the Pickup Truck both as his personal vehicle and as
25 part of his parking lot business. In 1998, he bought a sedan to use as his primary personal
26 vehicle and thereafter he used the Pickup Truck predominantly in his parking business.

27 Mehta gave Supervisor Hernandez permission to use the Pickup Truck for the business
28 purposes of Place 2 Park. According to Mehta, Hernandez was only to use the Pickup Truck for
business purposes. Mehta also permitted Hernandez to keep his own set of keys to the Pickup
Truck. When not being driven, the Pickup Truck was usually kept in the garage at Place 2

Park's business office located on Sutter Street in San Francisco.

For years, Hernandez used the Pickup Truck as part of his job at Place 2 Park. He understood he had permission from Mr. Mehta to use the Pickup Truck for company business. He drove the Pickup Truck frequently from lot to lot to check on the operations at each place. He drove the Pickup Truck from San Francisco to Oakland to check on the business' lots there.

He used the Pickup Truck to haul away garbage from parking lots. He also used the Pickup Truck to replace the old pay stations with new ones. At times, he would drive other workers in the Pickup Truck as part of those tasks.

Jorge Velasquez performed some work for the benefit of Mehta's business, including working with Supervisor Hernandez to replace old pay stations with new equipment at lots in both San Francisco and Oakland. For those purposes, Velasquez was driven as a passenger in the Pickup Truck by Hernandez when working at different lots.

3.The Defendant's Insurance Policy

Mehta obtained for his parking lot business a liability policy from FFIC. The policy contained provisions referred to as the "auto exclusion." The clause excludes coverage regarding bodily injury or property damage from certain motor vehicles under the following language.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. ...

* * *

- b.** This insurance applies to "bodily injury" and "property damage"

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- (1) The “bodily injury” or “property damage” is caused by an
“occurrence” that takes place in the “coverage territory”; and
- (2) The “bodily injury” or “property damage” occurs during the
policy period.

* * *

2. Exclusions

This insurance does not apply to:

* * *

g. Aircraft, Auto Or Watercraft

- (1) “Bodily injury” or “property damage” arising out of the
ownership, maintenance, use, operation, “loading or unloading”,
or entrustment to others of any aircraft, “auto” or watercraft
owned or operated by or rented or loaned to any insured.

* * *

DECLARATIONS

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Named Insured...

Safe Park Corporation, Car Park Management Corp. DBA Place 2 Park Corp.

* * *

Form of Business:...

X Organization (other than Partnership or Joint Venture)

* * *

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations.

* * *

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as: . . . [a] partnership or joint venture,... [a] limited liability company,. . . [or] [a]n organization other than a partnership, joint venture limited liability company, you are an insured.
2. Each of the following is also an insured:

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- 2 **a.** Your “employees”, other than either your “executive officers” (if you are
- 3 an organization other than a partnership, joint venture or limited liability
- 4 company) or your managers (if you are a limited liability company), but
- 5 only for acts within the scope of their employment by you or while
- 6 performing duties related to the conduct of your business.

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12 **SECTION V – DEFINITIONS**

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- 14 **2.** “Auto” means a land motor vehicle, trailer or semi-trailer designed for travel on
- 15 public roads, including any attached machinery or equipment. But “auto” does
- 16 not include “mobile equipment.”

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- 18 **3.** “Bodily injury” means bodily injury, sickness or disease sustained by a person,
- 19 including death resulting from any of these at any time.

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23 **INSURANCE COVERAGE ANALYSIS**

24 **1. The Insuring Agreement and Defendant’s Burden of Proof**

25 The insuring agreement in the FFIC CGL policy provides that the insurer “will pay those

26 sums that the insured becomes legally obligated to pay as damages because of “bodily injury” . .

27 to which this insurance applies.” In the language containing the auto exclusion, the FFIC CGL

28 policy goes on to provide that “This insurance does not apply to: . . . “bodily injury” arising out

of the . . . use [or] operation . . . of any “auto”¹ . . . owned or operated or rented or loaned to any insured.”

Under these facts, plaintiff has shown that he sustained “bodily injury” as those terms are used within the insuring agreement of the policy, subject to the operation of the auto exclusion. Defendant bears the burden of proof on the issue of whether facts surrounding the injury fall within the auto exclusion so as to bar coverage under the policy. *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 648.

2. The “Auto Exclusion”

The exclusionary language at issue contains two essential parts, each of which needs to apply under the facts in order to exclude liability for the injury from coverage under the FFIC CGL policy. Each is addressed separately.

a. Was Pickup Truck Used or Operated By An Insured?

First, the loss must have arisen out of either the “use” or “operation” of the pickup truck. The parties agree that the plaintiff’s injury did arise out of both the use and operation of the pickup truck. The court concurs, finding that substantial evidence exists to support that conclusion.² We then turn to the second part of the exclusion.

b. Was Pickup Truck “Loaned to” An Insured?

The second part of the exclusion requires that the auto must have been “owned or operated by or rented or loaned to any insured.” On this point, plaintiff argues several points. First, he contends that this part of the exclusion does not apply because, at the time of the incident, neither the operator of the Pickup Truck (Velasquez) nor the owner of the Pickup Truck (Mehta) met the definition of being an “insured” under the FFIC CGL policy.

¹ The parties do not dispute that the Pickup Truck being driven by Velasquez at the time of plaintiff’s injuries met the policy’s definition of an “auto,” and the court so finds under these facts.

² In the first part, the exclusion also includes the terms “ownership,” “maintenance,” “loading or unloading,” and “entrustment to others.” However, it is not necessary to consider those terms, as the court finds that the first part of the exclusion applies here because the injury arose from both the use and operation of the truck.

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2 The court need not consider those arguments because of the undisputed facts that show
3 that the Pickup Truck was clearly “loaned to” Place 2 Park, the named insured business, at the
4 time of the incident. For that reason, the second part of the exclusion applies.

5 The owner of the Pickup Truck (Mehta) permitted it to be used by the insured Place 2
6 Park business as part of its business operations. The Pickup Truck was garaged at the Place 2
7 Park business location. It was used predominately (if not almost exclusively) for that business.
8 Employees were allowed to keep keys to the truck in order to use it. Mehta himself used the
9 Pickup Truck for the business. Mehta authorized Hernandez to use the Pickup Truck for the
10 business and Hernandez used it for company business most of the time. He used it to move
11 signs, pay stations and trash .

12 Under those circumstances, the only way to characterize the understanding between
13 Mehta and the insured company, Place 2 Park, is to call it a loan of the Pickup Truck by Mehta
14 to the company. His lending the truck to the business thereby triggered the operation of the
15 exclusion – the Pickup Truck clearly was “loaned to” an insured, to wit, it was loaned to the
16 specifically named insured business itself, Place 2 Park.

17 Plaintiff also argues that the exclusion would apply on the “loaned to” basis only if the
18 actual use of the Pickup Truck at the time of the injury fell within the specific use for which
19 Mehta permitted it to be utilized for company purposes. On this point, plaintiff argues that
20 Velasquez did not have authority to drive the Pickup Truck at any time, and that his use of the
21 truck when the injury occurred was outside the permitted manner under which Mehta authorized
22 it to be used in the business.

23 The court finds plaintiff’s argument to lack merit. The policy language does not support
24 such a strained construction. The auto exclusion does not limit its application in the restrictive
25 manner plaintiff urges. All that is necessary to be shown under these facts is that the injury arose
26 from the use/operation of an auto that was loaned to any insured. The facts show that that is
27 exactly what occurred here. It is of no moment whether, at the time of the injury, the actual use
28 of the auto did or did not comply with the terms and conditions under which the loan was made.

Plaintiff’s argument also is contrary to California law. *Belmonte v. Employers Ins. Co.*

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2 (2000) 83 Cal.App.4th 430, involved facts nearly identical to those here. In *Belmonte*, the
3 plaintiff owned a store covered by a commercial general liability policy containing an auto
4 exclusion that was materially identical to that involved here. The plaintiff's 16-year-old niece in
5 *Belmonte*, who did not have a driver's license, took and used the plaintiff's car without the
6 plaintiff's permission. The niece then hit and injured another person while driving the car. The
7 insurer denied coverage based on the auto exclusion.

8 The *Belmonte* plaintiff attempted to argue that the auto exclusion did not apply because
9 he was not operating the vehicle himself, and that the auto exclusion only applied to uses by the
10 named insured himself. The Court of Appeal rejected the plaintiff's argument, finding that the
11 language of the exclusion was explicit in expressly excluding bodily injury "arising out of the ...
12 use of any 'auto' ... owned or operated by any insured." *Id.* at p. 435. The court concluded that,
13 because the injuries arose out of the niece's use of a car owned by the insured, the exclusion
14 barred coverage. It did not matter that she was not an insured under the policy. It also did not
15 matter that she did not have the insured's permission to use the vehicle. See also *Ace American*
16 *Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017; *Providence Wash. Ins. v. Valley Forge* (1996)
17 42 Cal.App.4th 1194; *Gurrola v. Great Southwest Ins. Co.* (1993) 17 Cal.App.4th 65; and *Ins. Co.*
18 *v. Bucaro* (1981) 101 Ill.App.3d 919, 428 N.E.2d 979.

19 In addition, in the case at bar, the facts do not support plaintiff's legal argument in any
20 event. There is no dispute that Hernandez was authorized to hire workers such as Velasquez to
21 help him and no dispute that he was authorized to drive workers in the Pickup Truck as part of
22 that task. There is no evidence showing that the operation of the Pickup Truck at the time of the
23 injury was not within the purpose for which Mehta loaned it to the business. In fact, the award
24 issued in connection with the underlying action (which forms the basis upon which plaintiff
25 brings this action) explicitly determined that Velasquez was in fact operating the Pickup Truck
26 as part of the Place 2 Park business and within the purpose for which Mehta loaned it to the
27 business. On this, the arbitrator wrote: "On April 23, 2003, the date of the subject incident,
28 defendant Jorge Velasquez, while in the course and scope of his employment with defendant,
Minesh K. Mehta, dba Place 2 Park Corporation, negligently caused injuries and damages to

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2 plaintiff, James Bosch.”

3 For these reasons, the court finds that the second prong of the auto exclusion applies
4 here, such that plaintiff’s claims for bodily injury are not subject to the insurance provided under
5 the FFIC CGL policy.

6 **CONCLUSION**

7 The parties have filed cross motions on this coverage issues. Defendant filed a motion
8 for summary judgment, contending that the plaintiff’s complaint, and the causes of action therein
9 (breach of insurance contract and breach of the implied covenant of good faith and fair dealing
10 “insurance bad faith”) are barred as a matter of law because of the auto exclusion contained in its
11 insurance policy. Plaintiff has filed a motion for partial summary judgment on the same issue, as
12 well as others.³

13 On the undisputed facts in the record, the court finds that defendant did not breach the
14 insurance contract because no benefits were due as a matter of law, thereby causing plaintiff’s
15 first cause of action for breach of contract to fail. As no claim for insurance bad faith may be
16 maintained absent any breach of insurance obligations, the second cause of action for insurance
17 bad faith also fails as a matter of law. *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1,
18 35; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153. For these reasons, the court
19 finds that defendant’s motion for summary judgment should be granted, and that judgment in
20 favor of defendant shall be entered, with defendant to recover costs.

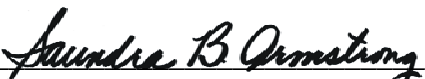
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³ Because the auto exclusion applies here to bar insurance coverage for the loss, it is not necessary for the
court to address the various other issues raised by the cross motions.

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For the same reasons that this court grants defendant's motion for summary judgment, the court shall and does hereby deny plaintiff's motion for partial summary judgment. Such denial is based on the court's determination of the same insurance coverage issues that form the basis of defendant's motion, which the court has granted.

IT IS SO ORDERED.

Dated: 6/6/06


SAUNDRA BROWN ARMSTRONG
United States District Judge

United States District Court